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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In the matter of B.C., et al.,
Persons Coming Under the
Juvenile Court Law.

B293306

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

(Los Angeles County
Super. Ct. No.
18CCJP05216)

Plaintiff and Respondent,

v.

BRYAN C.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of
Los Angeles County, Rashida A. Adams, Judge. Reversed in part,
affirmed in part.

Christine E. Johnson, under appointment by the Court of
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis,
Assistant County Counsel, William D. Thetford, Deputy County
Counsel, for Plaintiff and Respondent.

INTRODUCTION

Bryan C. (father) appeals from the juvenile court's jurisdictional finding and disposition order regarding his children, B.C. (born May 2015) and J.C. (born November 2017). He argues substantial evidence does not support the court's Welfare and Institutions Code, section 300, subdivision (b)(1)¹ finding that his failure to protect the children from mother's substance abuse created a substantial risk of future harm to the children. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. Dependency Petition Filed

On August 14, 2018, Cindy (mother) was staying at a motel with her children, three-year old B.C. and nine-month old J.C. Mother posted an Instagram video inviting her friends to come get high. When her friends arrived, she left B.C. in the room and brought J.C. downstairs in her arms. She then used nitrous oxide and posted an Instagram video of her inhaling balloons of it. Father saw the video and called the police. The motel manager saw mother inhaling nitrous oxide while holding J.C. in one arm. Law enforcement observed B.C. going up and down the motel stairs without supervision. That day, Department of

¹ All undesignated statutory references are to the Welfare and Institutions Code.

Children and Family Services (DCFS) received a referral alleging mother was arrested for using nitrous oxide and child endangerment.

DCFS interviewed father at the police station. He stated he cared about the safety of his children and had been reporting mother's inappropriate conduct to DCFS and law enforcement. He and mother were separated. Mother left the family home about a week before and took the children with her. Father and mother had ongoing issues because he felt her friends were bad influences and drug users. Mother would leave with the children whenever father would tell her not to go out with those friends. Father rented the motel room for mother and children while they were separated.

Seven months earlier, on January 5, 2018, father contacted DCFS to report mother was not allowing him to see their children, mother spoke to him while driving under the influence of alcohol, and mother would drive under the influence with the children. No custody order was in place, and father said he would look into seeking custody of the children in family law court. Between January 5, 2018, and the motel incident in August 2018, however, father did not go to family law court to seek custody.

The original petition was filed August 16, 2018 and contained three counts alleged pursuant to section 300, subdivision (b)(1). An interlineated petition was filed October 12, 2018, in which counts 2 and 3 were deleted, and count 1 was modified to allege the following: (a) mother's abuse of nitrous oxide and marijuana limited her ability to provide regular care and supervision of the children, (b) on August 14, 2018, mother left child B.C. in a motel room without appropriate adult

supervision,² (c) father knew of mother's substance abuse and failed to protect the children, and (d) mother's substance abuse and father's failure to protect the children endangered the children's physical health and safety and placed the children at risk of serious physical harm.

B. Detention Hearing

Father and mother were present for the detention hearing on August 17, 2018. The juvenile court found Bryan to be the children's presumed father. The court also found a prima facie showing of the petition's allegations had been made and ordered the children detained from mother's custody and placed with father. The court also ordered mother to not reside in the family home, and to have no unmonitored contact with the children.

C. Father's Conduct Between the Detention Hearing and Jurisdictional Hearing

After the detention hearing but before the jurisdictional hearing, none of father's conduct resulted in the children having unmonitored contact with mother. During this time, father made several reports to DCFS that mother was drinking alcohol and continued to use nitrous oxide.

D. Jurisdictional and Dispositional Hearing

At the October 12, 2018, combined jurisdictional and dispositional hearing, the court accepted mother's waiver of rights and plea of no contest. Father's counsel requested the

² The interlineation incorrectly states this happened on August 4, 2018.

court strike the allegation that he failed to protect the children from mother's substance abuse, and this request was joined by children's counsel. The court declined the request and found true the allegations against father.

In finding the department met its burden of proof, the court stated: "With respect to the father, there is evidence before the court that he has made referrals and with respect to the August 2018 incident, called the . . . police. However, the evidence before the court in its totality indicates that father's concerns with respect to the mother . . . were well-founded and have existed for quite some time."

"The evidence in the jurisdiction report includes evidence that the father had a concern with the mother's substance use sometime before the August incident and they . . . 'worked through it.' While the father has called in referrals, he did not take further steps, which would prevent the mother from having unmonitored contact with the children. And even in the August incident, while he [had] expressed concerns about the mother's ability to care for the children, still allowed a situation in which she did have them, leading to the events that led to the August incident."

"The department's argument in this case, the court agrees, does establish a failure to protect. The father did have within his ability, the opportunity to proceed to family law court in order to have some legal means to restrict the mother's access to the children and he did not pursue that."

"So the court finds on that basis that the count (b)(1) of the amended petition is true and finds the children to be persons described by Welfare and Institutions Code section 300, subdivision (b)." Father timely appealed.

DISCUSSION

Father argues substantial evidence does not support the section 300, subdivision (b)(1) finding against him. Before reaching the merits, we first address justiciability because jurisdiction with respect to the allegations involving the mother has not been challenged, and “[d]ependency jurisdiction attaches to a child, not to his or her parent.” (*In re D.M.* (2015) 242 Cal.App.4th 634, 638.)

“Because the juvenile court assumes jurisdiction of the child, not the parents, jurisdiction may exist based on the conduct of one parent only. In those situations an appellate court need not consider jurisdictional findings based on the other parent’s conduct. [Citation.] Nevertheless, we *may* exercise our discretion to reach the merits of the other parent’s jurisdictional challenge in three situations: (1) the jurisdictional finding serves as the basis for dispositional orders that are also challenged on appeal; (2) the findings could be prejudicial to the appellant or could impact the current or any future dependency proceedings; and (3) the finding could have consequences for the appellant beyond jurisdiction.” (*In re J.C.* (2014) 233 Cal.App.4th 1, 3-4, italics in original; see also *In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.)

Father notes this appeal will determine whether he is considered an “offending” or “non-offending” parent under the Welfare and Institutions Code. When the outcome of the appeal could be “the difference between father[] being an “offending” parent versus a “non-offending” parent,’ a finding that could result in far-reaching consequences with respect to these and future dependency proceedings, we find it appropriate to exercise our discretion to consider the appeal on the merits.” (*In re*

Quentin H. (2014) 230 Cal.App.4th 608, 613, internal citations omitted.)

Turning to the merits, we conclude substantial evidence does not support the jurisdictional finding concerning father on count 1. “In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings . . . we determine if substantial evidence, contradicted or uncontradicted, supports them. “In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court’s determinations; and we note that issues of fact and credibility are the province of the trial court.” We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court.’ “[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate].”” (*In re I.J.* (2013) 56 Cal.4th 766, 773, internal citations omitted.)

Section 300, subdivision (b)(1) describes four discrete grounds for dependency jurisdiction. The first clause concerns a child who has suffered, or is at substantial risk of suffering future “serious physical harm or illness[] as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child.” (§ 300, subd. (b)(1).) The record here does not show the children suffered serious physical harm. But even if the record showed the children previously suffered serious physical harm, courts have held the past infliction of harm by a caretaker, standing alone, does not establish a substantial risk of

physical harm; there must be some reason to believe the acts may continue in the future. (See e.g. *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824, overruled on another ground in *In re R.T.* (2017) 3 Cal.5th 622, 629.)

Thus, the issue here is whether the evidence shows father's conduct placed the children at risk of suffering future serious physical harm. "[T]he purpose of section 300, subdivision (b) is to protect the child from a substantial risk of *future* physical harm, and that risk is determined as of the time of the jurisdictional hearing." (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1397, *italics in original.*) A section 300, subdivision (b) finding requires a showing that "at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur)." (*In re Savannah M.*, *supra*, 131 Cal.App.4th at p.1396.)

The evidence in the record is insufficient to support a finding that *at the time of the combined jurisdictional and dispositional hearing on October 12, 2018*, the children were at substantial risk of *future* serious physical harm based on father's failure to protect them from mother's drug use before and leading up to the motel incident. The sole reason father was found by the court to be a risk of future harm was because, prior to the motel incident, he did not go to family court to attempt to prevent mother from having unmonitored contact with the children. But three days after the motel incident, the court ordered the children detained from mother's custody and placed with father. After that happened – and until the time of the jurisdictional hearing – nothing in the record shows father ever allowed mother sole supervision of the children. Nor does the record show father failed to protect the children from mother's drug use during that

period. The record thus contains insufficient evidence that father's conduct created a substantial risk of future serious physical harm to the children at the time of the jurisdictional hearing. (§ 300, subd. (b)(1); *In re Savannah M.*, *supra*, 131 Cal.App.4th at pp. 1396-1397; *In re David M.* (2005) 134 Cal.App.4th 822, 829.) Accordingly, we reverse.

DISPOSITION

The judgment is reversed on the jurisdictional finding that pertains to father. In all other respects the judgment is affirmed.
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CURREY, J.

WE CONCUR:

MANELLA, P. J.

COLLINS, J.